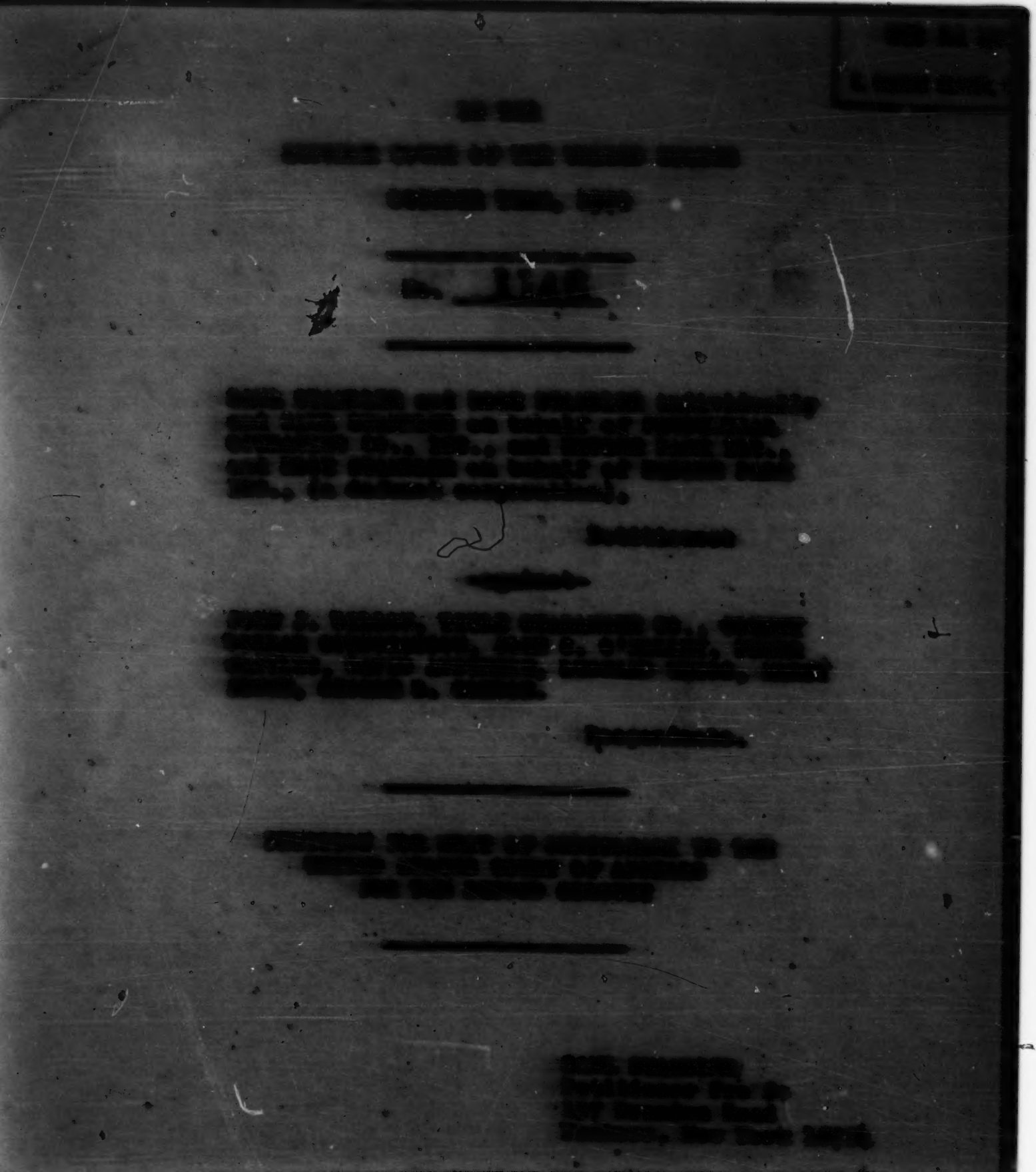

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. _____

SAUL STAMBLER and ROSE STAMBLER individually and SAUL STAMBLER on behalf of FUNDAMENTAL OPERATING CO., INC., and EMPIRE PARK INC., and ROSE STAMBLER on behalf of EMPIRE PARK INC., (a defunct corporation)

Petitioners

-against-

JOHN J. DILLON, TITLE GUARANTEE CO., COUNTY DOLLAR CORPORATION, JOHN C. O'MALLEY, PETER CASTLE, DAVID AUSTREICH, LEONARD GEISS, NANCY PETER, GEORGE B. GORDON.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Pro Se pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on September 23, 1970.

The opinion of Judge McGohey ruling that the District Court had jurisdiction and that the defendant state court justice had no immunity in an action for declaratory and injunctive relief, where there is no claim for money damages against that defendant, but dismissing the complaint as too general in its charges, appears in Appendix B,* infra and is reported in 288 F. Supp. 646. The opinion of Judge Herlands' ruling that the defendant state court justice, in an action for declaratory and injunctive relief where no claim of money damage is made against that defendant, has immunity from suit and that such immunity prevents the proof of state action against the codefendants and granting summary judgment dismissing the complaint appears in Appendix B, infra and is reported in 302 F. Supp. 1250. The opinion of Judge Wyatt denying a motion to amend the judgment and for leave to serve and file a second amended complaint is unreported and appears in Appendix B. infra.

The Circuit Court of Appeals affirmed without opinion.

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* References to Appendices A, B and C attached hereto are made by reference to "A" and page number and "B" and page number and "C" and page number.

The judgment of the Circuit Court of Appeals was entered on September 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The federal statutes involved are 42 U.S.C. § 1981 (R.S. § 1977), 42 U.S.C. 1982 (R.S. § 1978), 42 U.S.C. 1983 (R.S. § 1979), 42 U.S.C. 1985 (R.S. § 1980), 42 U.S.C. 1986 (R.S. § 1981), 42 U.S.C. 1994 (R.S. § 1990), as is Art. 1 Sec. 10 of the Constitution and the Fifth, Thirteenth and Fourteenth Amendments. Pertinent statutory provisions are set forth in Appendix A.

QUESTIONS PRESENTED

1.) Whether petitioner is entitled to declaratory and injunctive relief in a law-suit brought pursuant to Art 1, Sec. 10 of the Constitution, the Fifth, Thirteenth and Fourteenth Amendments and 42 U.S.C., 1981, 1982, 1983, 1985, 1986 and 1994 and 28 U.S.C. 1331, 1332, 1343, 2201 and 2202, where a state court justice made a judicial finding that petitioner was a "wrongdoer", but admitted that the allegedly wronged persons instituted no

action to invoke the jurisdiction of his Court, and made the findings of wrongdoing, contrary to the evidence before him, and thereafter used these findings as a basis to take from the petitioners property lawfully purchased by them, and thereby denied petitioners due process of law and equal protection of the law.

As to declaratory and injunctive relief the District Court (McGohey, J.)[1] ruled that the doctrine of judicial immunity did not apply and petitioners were entitled to relief in a proper case, but dismissed the complaint as too general.

The District Court (Herlands, J.)[2] ruled that the doctrine of judicial immunity granted immunity to the defendant state court justice, and further prevented proof of state action against the other defendants, not state officials, and dismissed the complaint.

The Court below affirmed without opinion.

2.) Whether in an action against a State Supreme Court Justice and others for declaratory and injunctive relief, and for damages against the others, not state officials, for violation of plaintiffs' civil rights, where one District Court Judge ruled that the

---

1 (B4)
2 (B9)

was not appealed and thus became res adjudicata, was it not substantial reversible error for another District Court Judge of concurrent jurisdiction to disregard the doctrine of "law of the case" and overrule the first judge's decision and hold there was judicial immunity and use his ruling as the basis for dismissal of plaintiffs' action against all defendants and thereby effectively denying the petitioners a trial on the merits.

The Court below affirmed without opinion.

3.) Whether the act of a state court justice, sitting as a trier of the facts without a jury, repeatedly making findings contrary to the evidence, and quoting facts out of context, to create a picture of wrongdoing and evil intent, supplies the evidence of "purposeful discrimination" necessary to invoke the Equal Protection Clause of the Fourteenth Amendment.

The District Court ruled the allegations frivolous.

The Court below affirmed without opinion.

4.) Whether the action of a state court justice in effect legislated a bill of attainder in violation of Article 1 Section 10 of the United States Constitution where he admitted that the allegedly defrauded persons had

has invoked the jurisdiction of his court and made findings that one of the plaintiff's was a wrongdoer and then granted judgment against all persons associated with that plaintiff, despite the fact that there was no evidence offered of any wrongdoing in the first place. This issue was ignored by the District Court and affirmed by the Court below without opinion.

5.) Whether it was error and an abuse of discretion under all circumstances for the District Court to deny the plaintiff the opportunity to present testimony to show that the following statement by a state court justice:-

> "While it is true that the persons who assigned the stock in Empire Park, Inc., and who executed affidavits to effectuate a conveyance of the gore have not instituted the present action, the court is of the opinion that the doctrine enunciated in the above cited cases should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts."

was an admission by that state court justice that he knew he was acting without jurisdiction and that his conduct came within the exception to the doctrine of judicial immunity as stated by this Court in Bradley v Fisher 80 U.S. 335, 351 as follows:

THE SUBJECT-MATTER ANY AUTHORITY EXERCISED IS A USURPED AUTHORITY, FOR THE EXERCISE OF SUCH AUTHORITY, WHEN THE WANT OF JURISDICTION IS KNOWN TO THE JUDGE, NO EXCUSE IS PERMISSIBLE."

The Court below affirmed without opinion.

6.) Whether the making of findings, by a state court justice, on subject matter of transactions, where he admits that no action is before him is the lack of subject matter jurisdiction which denies him immunity from suit pursuant to Bradley v Fisher, supra.

One district court judge ruled the state court justice had no immunity from suits for declaratory and injunctive relief.

The second district court judge ruled that the state court justice had immunity from any suit. Both judges dismissed the complaint.

The Court below affirmed without opinion.

7.) Where the rules of equity limit the imposition of a constructive trust to those who violate a pre-existing fiduciary or confidential relationship for their personal unjust enrichment, does the application by the state court justice, of the rules, governing violators of fiduciary or confidential relationship to one dealing at arms length and admittedly not a fiduciary, violate the due process clause of the Fourteenth Amendment and supply

the state action required under 42 U.S.C. 1983.

The District Court could see no violation of civil or constitutional rights.

The Court below affirmed without opinion.

8.) Whether the District Court committed substantial reversible error when it ruled as frivolous the claim that where there was no fiduciary relationship between the parties, and the relationship was that of vendor-purchaser, a state court justice could convert such arms-length dealing to a master and servant relationship, and compel the vendor to return to the purchaser the purchase price of the land as well as the land itself, thereby creating involuntary servitude in violation of the Thirteenth Amendment.

The Court below affirmed without opinion.

9.) Whether the District Court erred in denying the petitioner a trial on the merits and dismissed the complaint against the petitioner who sought declaratory and injunctive relief against a state court justice pursuant to the Thirteenth and Fourteenth Amendments and 42 U.S.C. 1983, on a charge of conspiracy between the state court justice in Westchester County, New York and the other defendants, where the complaint alleged overt acts of all of the defendants to convert a vendor-purchaser

relationship between the defendant Wasylec and plaintiff into one of master and servant, and to decree that the consideration paid by Wasylec was a payment for services and granting judgment that the plaintiffs must repay the consideration while permitting Wasylec to retain the land purchased, and thereby denied petitioners due process of law.

The Court below affirmed without opinion the judgment dismissing the complaint, and petitioner was prevented from going to trial on this issue.

10.) Whether the District Court in denying the petitioners a trial on the merits and dismissed the complaint against the petitioners in an action brought pursuant to the Thirteenth and Fourteenth Amendments and 42 U.S.C. 1983 and 1985 for declaratory and injunctive relief against all the defendants and damages against defendants not state officials, where the complaint alleges that these defendants conspired with a state court justice to take from the petitioners property lawfully purchased and to have the state court justice deliver the property to these defendants and to deny the petitioners due process of law.

The District Court found that the complaint alleged that the state court justice acted without jurisdiction, but ruled that the state court justice had

immunity and that the immunity prevented the proof of state action and denied the petitioners the right to a trial on the merits.

11.) Whether an action for declaratory and injunctive relief brought pursuant to 42 U.S.C., 1981 and 1982, the Thirteenth and the equal protection clause of the Fourteenth Amendment, based on the application of inaposite law and use of findings contrary to evidence, supply the necessary discrimination to afford relief. The District Court ruled that only discrimination because of color or race permit relief under 42 U.S.C. 1981 and 1982.

The Court below affirmed without opinion.

12.) Whether in an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. 1983, 1985 and 1994 and the Thirteenth and Fourteenth Amendments, where the complaint alleges a conspiracy by the defendants to deprive the plaintiffs of their liberty and property, without due process of law, and where the defendant state court justice made findings and rulings on subject matter where the jurisdiction of his Court had not been invoked and used such findings and rulings as the basis for granting a judgment in an action properly before him. The District Court ruled

that the doctrine of judicial immunity precluded the proof of state action and dismissed the complaint.

The Court below affirmed without opinion.

13.) Whether the Court of Appeals in affirming the judgment of the District Court, left in conflict the two opposing decisions of judges in the District Court, has so far departed from the accepted and usual course of judicial proceedings, and has so sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. The Court of Appeals gave no reason for affirming the District Court's judgment.

14.) Whether the Court of Appeals erred in affirming an order of the District Court denying a motion to serve and file an amended complaint where the District Court gave no reason for denying the motion.

15.) Whether in an action where the plaintiffs' charge a conspiracy to deprive them of their liberty and property without due process, did the District Court err in denying the petitioners a trial on the merits.

The Court below affirmed without opinion.

16.) Whether a District Court erred in granting a motion to dismiss a complaint against a plaintiff who sought declaratory and injunctive relief where the complaint charges a conspiracy between a state court justice

in Westchester County, New York, and a Title Insurance Company and other defendants - where the complaint alleged that the state court justice acted when he knew he lacked subject matter jurisdiction, and admitted knowing the jurisdiction of his court was not invoked, and where the complaint alleged that he made findings contrary to evidence to camouflage his acts in the conspiracy to deprive the plaintiffs of their liberty and property without due process of law, and declared one of the plaintiffs a wrongdoer in the subject matter of transactions where his jurisdiction was not invoked, and used such findings as a basis to declare that "no one should be permitted to profit from his wrongful acts" and thereupon granted judgment depriving the plaintiffs of their property, lawfully purchased, and decreed them in service to some of the defendants.

The Court below affirmed without opinion.

17.) Whether it was error and an abuse of discretion under all the circumstances by the District Court to deny the plaintiffs the right to amend their complaint to allege action pursuant to state law by the defendants, not state officials, and thereby show the state action necessary for relief under the Fourteenth Amendment and 42 U.S.C. 1983.

The Court below affirmed without opinion.

STATEMENT

The petitioner Saul Stambler has been found guilty of fraud and misrepresentation (C21) without a trial by a state court justice, the defendant John J. Dillon. There was no complaint by the alleged victims of the fraud and misrepresentation (C21) nor did they testify that they conveyed their interests because of representations. These alleged victims never made any claim that they sold shares of stock held by them for other than the monetary consideration.

That this was so is admitted by the defendant justice, when he admitted that these alleged victims instituted no action (C21) by which they invoked the jurisdiction of his Court.

This judicial officer without complaint or evidence decreed petitioners acts wrongful (C21) and ruled "no one should be permitted to profit from his own wrongful acts" (C23) and declared the title received by the petitioner was encumbered (C18) tho admitting that the petitioner paid for it (C18), and also granted judgment against petitioner's wife and the corporate entities owned by petitioner and his wife. (C23)

The complaint alleges that the defendants conspired to deprive these petitioners of their liberty and property without due process of law. The complaint

alleges that this finding of guilt of fraud and misrepresentation was completely unsubstantiated and contrary to the evidence presented to the defendant justice and was one of the overt acts in the conspiracy. (C11)

The purpose of the conspiracy was to aid the defendant Title Guarantee Co., to avoid paying a claim on a title that it had insured. This title covered a parcel of land actually owned at the time by Empire Park, Inc., (a dissolved corporation). (C15)

The defendant Wasylec had purchased part of the strip parcel of land from petitioner Stambler (Prudential Operating Co., Inc., successor in interest to Empire Park Inc., a dissolved corporation). (C 18) This purchase was also insured by Title Guarantee Co.

Both instituted actions against the petitioner directly or thru the corporate owner of the land. (C19)

The complaint alleges that the consolidation of these actions was an overt act in the conspiracy. (C8)

The complaint alleges that the petitioners were denied the basic safeguard of the due process clause of the Fifth and Fourteenth Amendments. (C5)

The complaint alleges that the petitioners were deprived of their rights without due process of law and subjected to involuntary servitude or deprived of their liberty and property and attached to the complaint as an exhibit is the decision (C15) of the defendant Justice Dillon and direct the attention of this Court to the fact

that where any doubt existed on any issue, that doubt was resolved against the petitioners.

This is an action by a husband and wife who charged that under the color of state law they were deprived of their liberty and property in an action in a state court because they acquired title to some land, part of which had already been appropriated by one of the defendants with the aid of another defendant. (C15)

They sought declaratory and injunctive relief against all of the defendants, and damages against all the defendants except the defendant John J. Dillon, a justice of the Supreme Court of the State of New York, Westchester County. They sought this relief pursuant to Art I Sec 10 of the Constitution, the Fifth, Thirteenth and Fourteenth Amendments, 28 U.S.C. 1331, 1332, 1343, 2201, 2202 and 42 U.S.C. 1981, 1982, 1983, 1985, 1986 and 1994. (C1) on the grounds that all the defendants conspired to use the states legal machinery to take from them what they had legally purchased under the color or a judgment to be rendered by the defendant Dillon. (C5). That as part of the conspiracy the defendant Dillon did vilify and attaint the plaintiff Saul Stambler by making findings of fact contrary to evidence and without evidence, (C11) and that pursuant to that attainder the plaintiff Rose Stambler and the corporate entities,

wholly owned by the Stamblers were to be deprived of the properties and the properties were granted to the co-defendants.

The motive for the conspiracy was the inability of County Dollar and Title Guarantee Co., to prove any title to the land appropriated by them. (C15)

Simply stated the facts are:

In 1960 Empire Park, Inc., (a dissolved corporation) owned a long strip of land in Yonkers, New York. (C15)

The corporation was dissolved by proclamation in 1938. (C16)

The president of the corporation died in 1955. (C16)

In 1960 County Dollar Corp., and its predecessor in title and part owner Cross Properties, Inc., with the aid of Title Guarantee Co., appropriated a portion of this strip, and included it between other lands it had purchased on both sides of the strip. (C15)

Wasylec also owned property on both sides of the strip. (C15)

In 1960 Wasylec contracted to sell two parcels of land that he owned as one contiguous parcel, and included part of the strip, to a group headed by Finke.(C15)

Wasylec did not disclose the existence of the

strip.

Finke, thru a survey, learned of the strip, did not disclose his knowledge and sought title insurance from two different title insurance companies.(C15)

The first title insurance company rejected title without learning about the strip. (C15) The second title insurance company, Title Guarantee took exception to the strip. (C15)

When all efforts to solve the title problem by Title Guarantee, Wasylec and Finke failed, Finke called upon this plaintiff, Saul Stambler, (C16) and agreed orally to purchase the needed portion of the strip if Stambler obtained and made marketable the title. No finding is made by the defendant Dillon as to the relationship between Stambler and Finke.

The decision gives the date of the meeting between Finke and Stambler as November 15, 1960, (C16) and states that Finke testified to referring Stambler to Wasylec's attorney, but makes no mention that Wasylec's attorney denied this.

The decision also states Stambler's version of what Finke said without mentioning that Stambler's statement refers to a conversation with Finke on December 7, 1960.

Neither version includes the term "disbursements" (C20) which indicates some agreement at variance with reported testimony.

The stock interests of Antoinette K. Gordon and of Sadye Schachner were purchased by the plaintiffs. (C17) and (C18)

Tender pursuant to the oral agreement was made to Finke, who repudiated his agreement, and refused to pay the disbursements pursuant to his agreement. (C20)

After title was perfected a portion of the strip was purchased by Wasylec, who immediately after the closing, instituted suit to recover the consideration without returning the land, afterward amending the suit to one for constructive trust. (C18)

Subsequently the plaintiffs thru (Prudential Operating Co., Inc.,) instituted a suit to rescind the sale because of Wasylec's fraud. (C19)

County Dollar and Title Guarantee Co., instituted suit against Empire Park Inc., (a new corporation) to bar claim even tho they had no title. (C19)

Wasylec and Title Guarantee moved before Justice Dillon to consolidate the actions, which Justice Dillon did. Justice Dillon thereafter tried the consolidated actions. (C15)

The decision of Justice Dillon was based on findings made by him on the subject matter of the transactions between Stambler and Antoinette K. Gordon, and Stambler and Sadye Schachner. (C21)

Justice Dillon heard testimony in reference to the transaction between Stambler and Antoinette K. Gordon from defendant George B. Gordon,[1] there was no testimony offered in reference to the transaction between Stambler and Sadye Schachner.

In reference to the transaction between Stambler and Antoinette K. Gordon, Justice Dillon heard the following admissions by defendant George B. Gordon:-

Gordon assumed he (Stambler) introduced himself as such and such an official of such and such company, when Stambler wrote on an official letterhead. (F 8-9)

He made no inquiries beyond the superficial indications. (F9)

He doesn't know if Stambler stated he was an official. (F9)

He doesn't remember the first telephone conversation. (F10)

He doesn't recall. (F10-11)

He doesn't recall. (F11)

He didn't ascertain who Mr. Stambler was, but assumed-- (F14)

He doesn't recall. (F 17-18)

---

1. The cross-examination of George B. Gordon is offered as a footnote to the petition and references are to F and page number.

He doesn't recall Stambler stating he had no connection with Wasylec. (F 24)

Gordon admits never hearing a blunt statement by Stambler that he represented Wasylec. (F 25)

He believes he asked Stambler whether he represented Wasylec in first conversation. (see statement on F 10)(F26)

He assumed documents were for Wasylec. (F26)

He thought Stambler assured him that he represented Wasylec in initial phone conversation. (see F 25, 26 and F 10) (F 36)

and thereafter Justice Dillon stated his findings that Stambler had misrepresented himself and that the letter-head was consistent with prior representations. (C 17)

In reference to the transaction between Stambler and Finke, Justice Dillon made this statement:

> "Even if Stambler's version and interpretation of the conversations had with Finke relating to the gore were accepted as true, the court could not approve of the manner in which title to the gore was acquired by Stambler. Whether Stambler formed the intent to acquire title to the gore for himself at the very incepttion of his introduction to the transaction, or whether he only formed such intent after Finke refused to pay him "disbursements" of $1,500., is not the controlling feature of this case. It is the court's opinion that once Stambler was advised that Finke would not pay him for his services, he was not at liberty to strike out on his own."(C 20)

In reference to the transaction between Stambler and Wasylec, Justice Dillon made these statement:

> "Wasylec agreed with Stambler to pay $15,000. for a conveyance of that portion of the gore which ran through the Wasylec property. A title closing was held on June 26, 1961, at which Prudential Operating Co., conveyed the necessary portion of the gore to Wasylec for $15,000." (C 18)
>
> "It cannot be said that any fiduciary relationship existed between the plaintiff and Stambler or any of the persons in the Stambler group. However, in the court's opinion the existence of a fiduciary relationship in and of itself is not the key question to be resolved in determining the liability, if any, of Stambler or the members of his group." (C 20)
>
> "Stambler and his associates will be permitted to retain the sum of $3,000. to defray expenses and to compensate Stambler for the fair and reasonable value of the services which he rendered." (C 23)

Appeals were taken to the Appellate Courts in New York State on constitutional grounds. Justice Dillon's decision was affirmed without opinion in the Appellate Division of the New York Supreme Court and the New York Court of Appeals dismissed the appeal on motion as it could not see any constitutional question. (B 3)

The plaintiffs in this law suit seek to show affirmatively the conspiracy between the state court justice and the codefendants to deprive them of their liberty and property using the office of the court to accomplish the purposes of the conspiracy and to deny

them their constitutional rights and due process of law.

In essence the complaint is that under color of state law the defendants conspired to deny the plaintiffs the equal protection of the law by applying to them the law relating to persons who violate a fiduciary duty while admitting that such a fiduciary duty did not exist.

That the defendant justice used his office to convert a vendor purchaser relationship into a master and servant relationship and to declare the vendor in service to the purchaser, all for the purpose of concealing or camouflaging the taking of property legally owned by Empire Park, Inc., and giving the title to such property to County Dollar and Title Guarantee Co.

This suit was instituted by the appellants filing the original complaint in the United States District Court for the Southern District of New York on February 8, 1968. Thereafter all the defendants were served and all defendants except the defendant Dillon answered the complaint. (B 4)

A. The defendants Wasylec, Avstreih and Weiss were proceeding to execute the judgment under attack in this suit by having the Sheriff of Westchester County, New York sell at auction the home of the petitioners. The petitioners moved by order to show cause to restrain this sale. This motion for a temporary injunction came on before the Hon. William B. Herlands, United States District Judge. Judge Herlands directed both sides to sub-

mit findings of fact and conclusions of law. Both sides conceded in the conclusions of law that a temporary injunction should issue. They disagreed as to the amount of the undertaking to be posted (B 8)

With the only issue before him, the amount of the undertaking to be posted, Judge Herlands admittedly went into the record and could not see any violation of civil rights or constitutional rights and denied the injunction. A notice of appeal was filed from the order denying the injunction. A motion was made in The Circuit Court of Appeals Second Circuit for a stay pending appeal. This motion was denied. The issues on that appeal became moot. (B 8)

B. The defendant Dillon, a justice of the Supreme Court of the State of New York sitting in Westchester County, moved to dismiss the complaint pursuant to Rule 12 (b) 1, 2 and 6 R.F.C.P.

This motion came on before Hon. John F. X. McGohey on April 30, 1968. The decision on this motion was filed with the Clerk of the District Court on July 13, 1968. (B 1)

Judge McGohey ruled that the District Court had jurisdiction of the action under 28 U.S.C. 1343.(B 4) and that the doctrine of judicial immunity did not apply. (B 4) He granted the motion to dismiss the complaint as the overt acts were not specifically alleged. (B 4)

The petitioners sought to examine the defendant Dillon and the defendant Title Guarantee Co. The District Court (Judge Bonsal) granted a protective order to Justice Dillon and Judge Tenney denied petitioner the opportunity to examine the defendant Title Guarantee Co.

The other defendants made motions for judgment on the pleadings and the petitioners moved to amend the judgment as to the defendant Dillon, and for leave to amend the complaint as to all defendants.

These motions came on for argument before the Hon. Charles Tenney, United States District Judge on August 13, 1968. By memorandum filed October 7, 1968 Judge Tenney denied the motions for judgment on the pleadings and granted petitioners permission to serve and file an amended complaint. (B 8)

In the original complaint, the petitioners used the terms "convicted" and "involuntary servitude" to describe the acts of defendant Dillon. These terms were ruled by Judge McGohey to be frivolous. (B 4)

The petitioners, therefore, moved for an order to examine the defendant Dillon, so that they could properly frame the amended complaint. (B 9)

This motion came on before the Hon. Inzer B. Wyatt, United States District Judge, on October 31, 1968. (B 17)

In his ruling Judge Wyatt said:

> "There is no authority under the Federal Rules of Civil Procedure for any such deposition."
>
> "Even if such a deposition were authorized, it is clear that it ought not to be permitted here."

Judge Wyatt ended his order with the following paragraph:-

> "The explanation made above establishes that such motions as the present are harassment to all those concerned. The plaintiffs are taking the time of judges of this Court to deal with essentially frivolous matters to the prejudice of other litigants in this Court. Plaintiffs are strongly advised to desist in such conduct. Continuance can only lead to the imposition of sanctions or the entry of an injunction against plaintiffs or both."

This paragraph has been described by some of the defendants as an "admonition", by Judge Herlands as a "comment" (B 9) and by the petitioners as a clear threat.

On November 29, 1968 the petitioners served and filed the amended complaint. All the defendants answered except the defendant Dillon, who again moved to dismiss the complaint.

The defendant Dillon filed his motion December 13, 1968 returnable January 14, 1969.

The other defendants, thereafter, moved for judgment on the pleadings all motions returnable on January 14th.

The motion by O'Malley, County Dollar and Title Guarantee was filed December 16, 1968 returnable January 14, 1969. The motion by Wasylee, Weiss and Avstreih was filed December 24, 1968 returnable January 14, 1969. The motion by Finke was filed December 24, 1968 returnable January 14, 1969. The motion by Gordon was filed January 2, 1969 returnable by January 14, 1969.

On January 14th, 1969, the Hon. William B. Herlands, United States District Judge was presiding in motion part. (B 5)

The petitioners, faced with five motions and prosecuting their claim pro se, made an application for an adequate adjournment to permit proper and complete briefing of the points raised by those motions. This application was denied.(B 8)

Petitioners served Judge Herlands with an affidavit of bias and prejudice. (B 8)

Five months later on June 23, 1969 the opinion and judgment of Judge Herlands was filed. (B 5)

The application for disqualification was denied in a footnote. (B 8)

Using the premise that the defendant Dillon was immune, (B 9) Judge Herlands ruled that the complaint failed to state a claim because the immunity prevented any proof of state action. (B 10)

Judge Herlands could not see any allegations in the complaint to support a claim under any of the sections of the Civil Rights Act under which the action was brought.

The petitioners had filed no briefs or affidavits in opposition to the motions before Judge Herlands nor were they given any opportunity to do so. (B 8)

Judge Herlands stated in his decision that he considered only the pleadings and that these petitioners were therefore not prejudiced by his refusal of an adjournment. (B 8)

On July 1st, 1969 the petitioners served and filed a motion pursuant to Rules 59 (e) and 15 (a) F.R.C.P. to amend the judgment and for leave to serve and file a second amended complaint. This motion was noticed for August 5, 1969. A memorandum of law and a proposed second amended complaint were served and filed the the proposed complaint was not entered on the docket. (B 13)

On August 5, 1969 at the request of the defendants and over the objection of the petitioners this motion was referred to Judge Herlands. Judge Herlands was not in the Courthouse. Judge Herlands passed away August 28, 1969. (B 13)

By order filed October 14, 1969, Sugarman, Ch. J.,

assigned the action to Wyatt, J. The docket reads "notice sent". No notice was received. (B 13)

On October 24, 1969, Judge Wyatt rendered his opinion (B 13) denying the motion to amend and made the following order:-

> The plaintiffs are ordered and directed to make no further motions or applications to this Court in this matter and to file no further papers in this Court except such as may be necessary or appropriate in connection with any appeals taken to the Court of Appeals. (B 18)

On November 7th, the petitioners filed an affidavit of bias and prejudice against the Hon. Inzer B. Wyatt, United District Judge.

On November 12th, Judge Wyatt held the affidavit to be insufficient.

On November 18th, 1969 the petitioner moved to reargue or for affirmative answers to the following questions:

1. The section of the law granting authority to a United States District Judge to deny a litigant the constitutional right to proceed in this Court pursuant to the Federal Rules of Civil Procedure.

2. The law on which the judge based the denial of motion.

3. The good reason on which the judge based his exercise of discretion as mandated by the United States

Supreme Court in Roman v Davis 371 U.S. 178.

On December 1st, 1969 this motion was denied. The questions were not answered.

On November 7th, 1969 the petitioners filed a notice of appeal from both the judgment by Judge Herlands and the order of Judge Wyatt.

On December 9th, 1969 the petitioners filed an amended notice of appeal from the judgment and both orders.

Petitioner was foreclosed in the motion part from proceeding to trial on the first complaint (appendix B) which ruled that the District Court had jurisdiction of the action pursuant to 28 U.S.C. 1343 and that the doctrine of judicial immunity did not apply in actions for declaratory and injunctive relief. The complaint was dismissed as the overt acts were not specifically described.

Petitioner was foreclosed in motion part from proceeding to trial on the amended complaint when the District Court ruled that the doctrine of judicial immunity did apply and that such immunity prevented proof of state action against the codefendants. No answer was made by the defendant justice nor was any affidavit submitted by the defendant justice in support of a 12(b) motion to dismiss the complaint. Judge Herlands stated that on this motion he was only considering the pleadings, as the petitioners had not submitted any affidavits in opposition and had requested an adjournment

which request was denied. The petitioner served Judge Herlands with an affidavit of bias and prejudice.

Petitioners were denied the opportunity to replead to show state action against the other defendants whether or not the state court justice remained as a party defendant.

The Court below affirmed, without opinion.

REASONS FOR GRANTING THE WRIT

I. There is no tribunal to redress wrongs committed by judges. Even judges recognise this lack and the following quotation is appropriate.

> Probably we all remember that Canon One of the Canons of Professional Ethics admonishes lawyers to:
>
> . . . maintain towards the courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance.
>
> The Canon goes on to say that because judges are not fully free to defend themselves, they are entitled to receive the support of the bar against unjust criticism and clamor. But how many can remember the last two sentences of that canon? I find that most lawyers in this state have never heard of them.
>
> The Canon adds this:
>
> Whenever there is proper ground for serious complaint of a judicial officer it is the right and duty of the lawyer to submit his grievances to the *proper authorities*. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.
>
> Would someone please tell me what is the proper authority to which a lawyer may submit his grievances in the state of Washington? I asked members of the Board of Governors of the State Bar Association and received guesses like the state Supreme Court chief justice, the state court administrator, or the assignment judge of the court to which that judge belonged. Another thought it was a bar association responsibility but did not specify state or local.
>
> They are all incorrect. There is no proper authority in this state.

This excerpt from an article by the Hon. Eugene A. Wright, Judge of the United States Court of Appeals, 9 Circuit in Judicature Vol. 53 Number 4, November 1969, entitled

"What is Proper Authority under Canon 1", applies in most states of the Union.

The misconduct of the few judges which goes unpunished undermines the respect for the many fine men who conscientiously seek to adjudicate the problems of our complex society.

Where a wrong has been committed by an official or judge, who used the power vested in him by his office to vent his spleen or to misuse that power because of other considerations, not in the public good, there must be available some means of redress, or some means to expose that misconduct. This action is directed toward the exposure of such acts.

As Chief Judge Learned Hand said in Gregoire v Biddle 177 F. 2nd 579, 581

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery.

> There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors.

All the decisions in actions against judges for damages cite Bradley v Fisher 80 U.S. 335 as the basic law on the doctrine of judicial immunity from liability for civil damages. In that basic decision this Court specifically excepted from this doctrine acts by a judge who lacked subject matter jurisdiction and knew of that lack of jurisdiction.

In decision after decision, where courts grant immunity to a state court judge, this exception is cited as the only basis for liability.

In this action the petitioners quote the admission by the state court judge that the victims of an alleged fraud make no such complaint, and brought no action to invoke the jurisdiction of his Court.

In view of the statement by this Court in Bradley v Fisher supra that where the "lack of jurisdiction is known to the judge any authority exercised is a usurped authority", it was clearly error to describe the acts of the defendant state court judge as being "in the course and scope of his judicial duties".

II. This is an action for declaratory and injunctive relief against all the defendants.

The petitioners seek by this action to expose the misconduct and conspiracy of the defendants and particularly the defendant state court judge.

No claim of civil liability is made against the state court judge. The action can be considered as an action <u>in rem</u> to determine the validity of the acts of this defendant. If as these petitioners contend he acted without subject matter jurisdiction his acts would be void as he did what he had no right to do.

Any claim of judicial immunity does not apply in this case. A similar claim to immunity in an action for injunctive relief was made in U.S. v Clark 249 F.Supp. 720, 727. The court's discussion of the subject of judicial immunity in such actions is very appropriate to this case:-

> [4-6] The argument is advanced on behalf of the defendants Judge Hare, Solicitor McLeod, and Judge Reynolds, that they, as judicial officers, may not be enjoined; this argument is based upon the theory that they are immune from suit on matters growing out of their judicial acts, notwithstanding the fact that their conduct may have exceeded their jurisdiction. This doctrine of "judicial

immunity" is a sound one and ingrained in the substantive law of both the Federal and State courts. Norton, et al. v. McShane (5th Cir. 1964), 332 F.2d 855, and the several cases cited therein; Zellner v. George Wallace, MD Ala.1964, 233 F. Supp. 874. The Federal courts have applied it to numerous Federal officials.[10] *However, such a doctrine of judicial immunity applies only when those officials are faced with civil suits for damages in connection with the performance of their official duties.* The doctrine has no application where, as here, the relief sought is preventive. In this connection, it is well established that the United States, suing under a Federal statute conferring mandatory jurisdiction on a Federal court, is entitled--if the evidence warrants it--to injunctive relief against State and local officials. United States v. Wood, 295 F.2d 772, (5th Cir. 1961), cert. denied 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9. This includes sheriffs, prosecutors and all others, whether they be judges or governors, who may participate in a scheme or engage in a pattern of conduct designed to deprive citizens of their constitutional rights. The principle that no State official--regardless of his position--is immune from having his conduct challenged—in the form of a preventive action--is well established. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5; Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632; Sterling v. Constantin,

287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375; Bush v. Orleans Parish School Board (E.D.La., 1960), 187 F.Supp. 42, aff'd 365 U.S. 569, 81 S.Ct. 754, 5 L.Ed.2d 806; In re Wallace (M.D.Ala., 1959), 170 F.Supp. 63.

[7] Since 42 U.S.C. § 1971 and Title II of the 1964 Act confer mandatory jurisdiction upon this Court and there is no immunity from a preventative relief suit such as this one, the assertions on behalf of the defendants, Judge Hare, Solicitor McLeod, Sheriff Clark and Judge Reynolds, are without merit. Such an action involves no interference with judicial discretion since an injunction—if warranted by the evidence and if issued—will only prevent the doing of what there is no right to do. Ex parte Young, 209 U.S. 123, 159, 28 S.Ct. 441, 52 L.Ed. 714.

III. Initially this is an attempt by the petitioners to use the courts to redress a wrong done by a public officer - a state court justice. As against that official there is no claim made of <u>civil liability</u> for <u>money damages</u>.

The petitioners are seeking a declaration that misconduct by a state court justice renders his acts null and void.

The petitioners were denied the basic safeguard of the due process clause of the Fifth and Fourteenth Amendments.

In St. Joseph Stockyards Co., v United States 298 U.S. 38, Mr. Justice Brandeis in his concurring opinion said:-

> "The inexorable safeguard which the due process clause assures is not that a Court may examine whether the findings are correct, but that the trier of the facts shall be an impartial tribunal, that no finding shall be made except upon due notice on opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial;"

The wrongs committed by this judicial officer were multiple and motivated by his desire to distract attention from his act of taking property lawfully owned by Empire Park, Inc., and granting title to that property to County Dollar and Title Guarantee.

A. To distract attention from his own acts, this officer vilified the first named plaintiff by making findings contrary to evidence.

a-1) He heard testimony by the defendant Gordon that Gordon assumed a representation that this plaintiff represented a title company and based that assumption on a letter-head from an abstract company, he also heard the defendant Gordon state that there was no representation made that this petitioner represented the defendant Wasylec - despite this evidence the defendant justice made a finding that this plaintiff did make such representations, and that the use of the letter-head was consistent with prior representations.

a-2) The defendant justice heard testimony by the defendant Finke that Finke had referred the plaintiff Saul Stambler to John J. McQuade, a former attorney for defendant Wasylec, he also heard this testimony denied by both this petitioner and by John J. McQuade and thereafter reported the testimony of the defendant Finke without disclosing the denial made by John J. McQuade.

a-3) The defendant justice heard testimony from the defendant Gordon that Gordon and two other persons as administrators of the estate of Milton J. Gordon, deceased, gave a deed to the defendant Wasylec, and the defendant justice also saw the affidavit of Sadye Schachner which stated that Milton J. Gordon never owned any stock in

Empire Park, Inc., (the dissolved corporation) and thereafter made a finding that Wasylec received "a deed from the survivors of the sole owner of all except the organizational stock of that corporation".

B. The defendant justice quoted facts out of context to create an impression of evil intent:-

b-1) He quotes the defendant Finke as stating that Finke referred Stambler to McQuade, and quotes Stambler as stating that Finke said that Stambler should acquire the property, perfect title and thereafter offer the property to either Finke or Wasylec, but the justice doesn't disclose the fact that Stambler's testimony refers to a conversation that took place three weeks after the date of Finke's alleged statement and after Stambler had acquired the property and had expended both money and work according to an agreement between Stambler and Finke, which Finke repudiated.

b-2) Justice Dillon states, "However, the proof is clear that Stambler did not approach Wasylec until after he had acquired title to the gore." Justice Dillon does not mention the specific agreement that required Stambler to deliver title to Finke and only to Finke. Any implication that any party other than Finke had any right to ask delivery of title without paying a consideration was wholly a judge made implication in fact, and was one of the overt acts in the conspiracy.

C. He quoted descriptions of fraudulent activities by a fiduciary or confidant from decisions in cases involving a fiduciary or confidential relationship knowing and admitting such relationship did not exist between the plaintiffs and any of the defendants.

D. Using all the foregoing to make findings of wrongful acts and wrongdoing and then using these findings as the basis to grant judgment against the plaintiffs and the corporate parties on whose behalf they are now seeking relief, though admitting that none of the wrongful acts were committed against any of the defendants and that the alleged victims of the wrongdoing make no claim of fraud and misrepresentation and instituted no action to invoke the jurisdiction of his court.

This is not an attempt to retaliate for an unfavorable decision honestly arrived at thru honest mistake, but is an attempt to expose acts by an officer who admitted that he lacked jurisdiction over the subject matter but was using his findings to aid his codefendants.

While "public policy requires that persons occupying such important positions should speak and act freely and fearlessly in the discharge of their important official functions", this same policy requires that such persons act honestly.

This is not a case of mistake or error. The defendant justice made findings directly contrary to testimony he heard, accepted thoughts, assumptions and inuendoes as proven fact and admitted his lack of jurisdiction over subject matter on which he based his decision.

This Court specifically excepted from the doctrine of judicial immunity the acts of the defendant justice when it stated in Bradley v Fisher 80 U.S. 335, 351

> " Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

It therefore follows that a definition or understanding of jurisdiction is the determining factor in granting or denying immunity in a suit for civil damages against a judicial officer.

The New York State Court of Appeals in Murray v Brancato, 290 N.Y. 52,55, describes this requirement in the following words:-

> The rule or principle of exemption has been stated in many opinions and in varying forms, but " It is to be seen that in these different modes of stating the principle, there abides a qualification. To be free from liability for the act, it must have

> been done as judge, in his judicial capacity; *it must have been a judicial act.* So it always remains to be determined, when is an act done as judge, in a judicial capacity? And this is the difficulty which has most often been found in the use of this rule, and which is present here; to determine when the facts exist which call into play that qualification. For it is plain that the fact that a man sits in the seat of justice, though having a clear right to sit there, will not protect him in every act which he may choose or chance to do there." (*Lange* v. *Benedict*, 73 N. Y. 12, 23, 26.)

The "normal duties" of judicial office require the judge to decide the issues between parties who invoke the jurisdiction of his Court.

Reynolds vs. Stockton (140 U.S. 265) defines and illustrates jurisdiction as follows:

> Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over

these particular interests, which they choose to draw in question, that a power of judicial decision arises." And again: "A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated.

In Standard Oil Co. vs Missouri et. (224 U.S. 270, 282) This Court stated the same proposition in this manner.

> Under the Fourteenth Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court has original general jurisdiction, criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which, in its essential character, is not responsive to the cause of action on which the proceeding was based.
>
> "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. . . . The judgments mentioned, given in the cases supposed, would not be merely erroneous: they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases." *Windsor v. McVeigh*, 93 U. S. 274, 282. See also *Reynolds v. Stockton*, 140 U. S. 254, 285-288. *Barnes v. Railway*, 122 U. S. 1, 14.

Based on the foregoing rulings it follows that the following statement by the defendant Dillon

> "While it is true that the persons who assigned the stock in Empire Park, Inc., and who executed affidavits to effectuate a conveyance of the gore have not instituted the present action, the court is of the opinion that the doctrine enunciated in the above cited cases should be utilized to protect the interests of those persons who actually sustained damages because of Stambler's wrongful acts".
> (Emphasis added)

is an admission that he was acting on subject matters where his jurisdiction had not been invoked and was ministering to his own personal prejudices or arrangements.

It should be noted that damages the defendant Dillon mentions were:-

1. The frustration of attempted frauds by both defendants Wasylee and Finke.

2. The exposure of land stealing by defendants County Dollar and Title Guarantee.

IV. The District Court should not have dismissed the complaint without any affidavit from the defendant state court justice or denied the plaintiff the right to an answer to the complaint by that defendant.

The complaint alleged a conspiracy by all the defendants to deprive the plaintiffs of their liberty and property and to deny them the equal protection of the law and due process of law. The complaint also alleges that

the defendant state court justice made findings contrary to the evidence knowing them to be contrary and appended to the complaint as an exhibit is the decision of that defendant.

The dismissal of the complaint, as to the other defendants by the District Court on the ground that the immunity granted to the defendant state court justice prevented proof of state action, is clearly erroneous and is contrary to the ruling by this Court in Adickes v Kress 90 S Ct. 1598, 1605 where the Court said:-

> [9, 10] The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful; Monroe v. Pape, *supra*; see United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941); Screws v. United States, 325 U.S. 91, 107–111, 65 S.Ct. 1031, 1038–1040, 89 L.Ed. 1495 (1945); Williams v. United States, 341 U.S. 97, 99–100, 71 S.Ct. 576, 578–579, 95 L.Ed. 774 (1951). Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents." United States v. Price, 383 U.S., at 789, 86 S.Ct., at 1157.'

Mr. Justice Black concurring in Adickes v. Kress, supra stated the rule as to summary judgment in federal court, even more applicable to 12(b) motions to dismiss:

> "Summary judgments may be granted only when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact...' The existence or nonexistence of a conspiracy is essentially a factual issue which the jury, not the trial judge should decide.' "

V. The act of the defendant Justice Dillon was either the legislating of a bill of Attainder or a deprivation of liberty and property without Due Process of Law.

This defendant admitted that no action had been instituted by persons who sold property to the plaintiffs, it therefore follows that "any authority exercised was a usurped authority" Bradley v Fisher supra, and he was not acting in the "course)and scope of his judicial duties" and had no right to exercise the "normal duties of his office".

In an article in the California Law-Review (Vol. 54: 212, 214, the following description of the characteristics of a Bill of Attainder are stated:-

"A typical bill of attainder had four essential characteristics: (1) It identified the victim by name, (2) it recited his actions which Parliament felt deserved punishment; (3) it contained a declaration of guilt; and (4) it prescribed the punishment.

If in the above description the term "Judge" is substituted for "Parliament" the nature of Justice Dillon's decision is perfectly clear.

Since his jurisdiction was not invoked it cannot be said that Justice Dillon acted as a "Judge".

The District Court (Herlands, J.) ruled that the doctrine of judicial immunity prevents the proof of state action against codefendants not officials of the state in an action under 42 U.S.C. 1983. This Court's ruling in Adickes v S.H. Kress & Company, supra clearly shows the District Court's ruling to be erroneous.

Whether or not Justice Dillon was named as a defendant can not be the criteria in determining state action. If the judicial function of the state was used to accomplish the purposes of the conspiracy, that in and of itself supplies the state action, as that use was the only means of accomplishing the purposes of the conspiracy.

This Court said:

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of States to which the Amendment has reference includes state courts and state judicial officials"

Shelly v Kraemer
334 U.S. 1, 18

VI. The abuse of discretion by the District Court and the affirmance by the Court of Appeals cry out for action by this Court.

a) The first District Court Judge rules that the doctrine of immunity does not apply in an action for declaratory and injunctive relief.

The second District Court Judge says it does.

A third District Court Judge says that even if the rules permit, no depositions should be permitted in this case, and thereafter refuses the plaintiffs the opportunity to replead.

b) The complaint alleges that the defendant state court justice acted when he knew his jurisdiction had not been invoked.

The first District Court Judge calls the acts of the defendant state court justice the "normal duties of his office".

The second District Court Judge describes the defendant justice's acts as in "the course and scope of

his judicial duties".

When the defendant state court justice made a judicial finding of "wrongdoing - fraud misrepresentation - wrongful acts" the second District Court Judge alters this to a mere "remark".

The abuse of the term "frivolous" without any frame of reference flies directly in the face of the mandate in Adickes v S.H. Kress, supra.

The plaintiffs seek a trial on the merits. The plaintiffs claim that their complaint states a cause of action and a claim on which relief can be granted.

The judges in the lower courts seem intent on protecting from exposure the conduct of a colleague, no matter how illegal and how wrongful such conduct may be.

VII. Initially it should be noted, that in this action pursuant to the civil rights laws and the Thirteenth and Fourteenth Amendments, the only claim as against the state court justice is for declaratory and injunctive relief.

As this Court in the concurring opinion by Mr. Justice Stone in Hague v Committee 307 U.S. 496, 519, stated:-

> "the right to maintain a suit in equity to restrain state officers, acting under a state law, from infringing the rights - - - -guaranteed by the due process clause, is given by act of Congress to every person within the jurisdiction of the United States whether a citizen or not and such suit may be maintained in the district court without allegation or proof that the jurisdictional amount required by § 24(1) of the Judicial Code is involved."

The District Court clearly misapplied the doctrine of judicial immunity in this law suit.

VIII. The approval by the Court below of the District Court's dismissal of the complaint makes a travesty of the plain meaning Civil Rights laws and the Thirteenth and Fourteenth Amendments where the complaint clearly alleges that the defendant state court justice usurped authority over subject matter where the jurisdiction of his Court had not been invoked and admitted his lack of jurisdiction.

This clearly brought his actions into the exception to the doctrine of judicial immunity by the ruling in Bradley v Fisher 80 U.S. 335, supra.

It appears that the narrow exception to the doctrine which limited liability to acts of judges who had "no jurisdiction and knew they lacked jurisdiction" is now to be closed and judges to be above the law.

The approval by the Court below, of the dismissal of the complaint in the motion part of the District Court, violates the plain meaning of 42 U.S.C.§ 1983, where the complaint clearly alleged the overt acts of the defendants in converting a vendor-purchaser relationship at arms length into a master and servant relationship while admitting the non-existence of a fiduciary duty and thereupon imposing a duty on the plaintiffs after the fact. If this were done by legislative act there would be no question that such act would be barred by the Ex Post Facto Clause (Art 1 Sec. 10) it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction. Bouie v City of Columbia 378 U.S. 347, 353.

Constructive trust, which is an equitable remedy to prevent unjust enrichment by a fiduciary or confidant and is limited to such preexisting relationships, if applied where such relationships do not exist would create an involuntary servitude prohibited by the Thirteenth Amendment or a deprivation of liberty prohibited by the Fourteenth Amendment.

The enlargement of the application of this remedy by a state court to persons dealing at arms length, over-ruling a consistent line of decisions limiting this remedy to persons in a fiduciary capacity with the

retroactive effect of denying a litigant notice of liability thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend his substantive right" Brinkerhoff-Faris Trust and Savings Co. v Hill 281 U.S. 673, 678.

When as in this case the unforeseeable state court enlargement of the application of this remedy of constructive trust to persons dealing at arms length is applied retroactively to subject a person to quasi criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct could be deemed wrongful. Bouie v City of Columia supra.

> Applicable to either situation is this Court's statement in *Brinkerhoff-Faris, supra*, that "if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute." *Id.*, at 679-680.

This Court has been moving toward the implementation of civil rights legislation, passed shortly after

'adoption of the Fourteenth Amendment, particularly in the area of property law which should certainly be extended to other rights as did Congress in the Civil Rights Act of 1964, Reitman v Mulkey,387 U.S. 369 (1967), Jones v. Alfred Mayer,392 U.S. 409 (1968), Hunter v. Erickson, ____U.S._____, (Jan. 20, 1969).

The history of our country shows that in the past white men as well as negroes have been held in servitude. The struggle for equal protection of law applies to white men as well as black men. If a white man can be denied the equal protection of the law, then it undermines the very basis upon which to determine the rights of black men.

IX. The defendant Dillon used his power as a state court justice to restrict the liberty of the petitioner and to create an involuntary servitude.

There is no question that Finke conferred with the petitioner Stambler about solving a problem affecting the title to a piece of land.

There is no question that Stambler solved that problem.

The circumstances under which Stambler called on Finke to pay him "disbursement" of $1,500.00 are not revealed by the defendant Dillon.

The defendant Dillon does not disclose the relationship between Stambler and Finke.

He merely rules "It is the Court's opinion that once Stambler was advised that Finke would not pay for his services, he was not at liberty to strike out on his own".

WAS STAMBLER A SLAVE?

There is no question that there was no agreement between Wasylec and Stambler to solve a problem.

There is no question that Wasylec purchased a piece of land from Prudential Operating Co., Inc.

There is no question that to solve the problem Rose Stambler purchased the interests of Antoinette K. Gordon and Sadye Schachner in Empire Park, Inc., (a defunct corporation) with her own funds.

Had all this not taken place and had Dillon made an order directing Stambler to use his knowledge and efforts and Rose Stambler her funds to purchase this land, clear the title and do so under terms and conditions made by Dillon under his state power, there would be no question that such act by Dillon would not only be illegal, but would also make Dillon subject to penal action by the United States for violation of the Thirteenth Amendment to the United States Constitution.

It is therefore clear that what Dillon could not do directly he could not do indirectly.

In Bailey v Alabama 291 U.S. 219

The Supreme Court said:-

> "What the state may not do directly it may not do indirectly."
>
> "The act of Congress deprives of effect all legislative measures of any state through which, directly or indirectly, the prohibited thing, to wit, compulsory service,....., may be established or maintained."
>
> "The state may impose involuntary servitude as punishment for crime, but it may not compel one man to labor for another."

It therefore follows that Dillon could not appropriate the efforts of Stambler and decree them as service for Wasylec nor could he take property purchased by Mrs. Stambler with her own funds and decree that property to be Wasylec's and County Dollar's.

It is obvious that it was the clear intention of Dillon to create an involuntary servitude.

When we compare the statements in his so-called decision with the badges and incidents of slavery described in the decision of the United States Supreme Court in Jones v Mayer & Co., (392 U.S. 409), Dillon's acts and intentions become apparent:-

> "Its 'burdens and disabilities'....included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right ---- to inherit, purchase, lease, sell and convey property".
>
> "Slaves were not considered men. . .They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out;. . . .they could not appeal from their master; they could be punished at will."
>
> Jones v Mayer
> 392 U.S. 409

X. By an order made October 7, 1968 Judge Tierney amended Judge McGohey's earlier order and granted permission to serve and file an amended complaint.

On November 29, 1968, petitioners filed and served an amended complaint. The Federal Rules require the answer to be served within ten (10) days.

The defendant Dillon went "shopping" for a judge more favorably disposed" and passed over two other judges to reach such a favorably disposed judge, Judge Herlands who was sitting in motion part on January 14, 1969.

As a favorably disposed judge, Judge Herlands could find no basis to dismiss the complaint if the defendant Dillon could not hide behind a cloak of judicial immunity.

For this reason Judge Herlands reversed the ruling of Judge McGohey that defendant Dillon, in this action, had no immunity.

The only issues for Judge Herlands to consider were the ones that Judge McGohey said remained to be determined:-

> "There remains to be considered the claimed conspiratorial deprivation of the plaintiffs' rights by Justice Dillon. Whether such a claim may be laid under sections 1983 and 1985 of Title 42 need not be decided here for in any event the complaint fails to allege sufficient facts to show that Justice Dillon was part of any such conspiracy if one existed. This is not enough."

and whether the amended complaint alleged sufficient facts to sustain the allegation of a conspiratorial deprivation of rights pursuant to 42 U.S.C. 1983 and 1985.

Were Judge Herlands to examine the complaint as to the sufficiency of the allegations he would have to sustain the complaint. For this reason he chose to disregard the doctrine of the law of the case and resort to the misuse of the doctrine of judicial immunity while recognizing that the relief sought against the defendant Dillon was declaratory and injunctive "and that the complaint alleged that the defendant Dillon acted where he lacked subject matter jurisdiction".

Petitioners ask that the doctrine of "law of the case" be applied.

In examining this doctrine in Dictograph Products Company Inc. v Sonotone Corporation 230 Fed. 2nd, 131, the Court stated as one of the reasons why a second judge should not reverse the first judge's ruling "if he does not do so defer, the defeated party may shop about in the hope of finding a judge more favorably disposed. ....The second reason has indeed much to recommend it, and, as a matter of practice has been universally regarded a sufficient reason for treating the first ruling as conclusive. The full quotation is:-

> No one will suggest that the first judge himself may not change his mind and overrule his own order, so that the basis of the doctrine can only be that there are reasons why the second judge may not do so that do not exist when the first does. We can think of only two such reasons: (1) the second judge should defer to the rule of the first as a matter of mutual respect between members of the same court; (2) if he does not so defer, the defeated party may shop about in the hope of finding a judge more favorably disposed. The first reason is clearly untenable; judicial sensibilities should play no part in the disposition of suitors' rights. The second reason has indeed much to recommend it, and, as a matter of practice, has been universally regarded a sufficient reason for treating the first ruling as conclusive.

There is no doubt that many judges find it repugnant to the integrity of the judiciary that there are men sitting on the Bench who should not be there. When, as in this action, it is shown that a judge violated the Canons of Judicial Ethics as well as the rules of pro-

cedure so blatantly, many judges, in their own interest and self-preservation, seek to protect their colleagues.

Judge Herlands, evidently, sought to protect his own standing by protecting defendant Dillon and contrary to the policy of the Courts overruled and reversed the "law of the case" by considering matters already decided.

In the Dictograph case (supra) it was ruled:-

> "That this is the only proper use of the doctrine appears from Messinger v. Anderson, 225 U.S. 436, 441, 32 S.Ct. 739, 740, 56 L.Ed. 1152, where the Supreme Court, through Holmes, J., spoke as follows: "In the absence of statute the phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power." This was in substance repeated in United States v. United States Smelting, Refining & Min. Co., 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94 L.Ed. 750: "The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be an end of the matter."

CONCLUSION

This Court should grant the petition for Certiorari and direct a trial on the merits.

Respectfully submitted,

SAUL STAMBLER
Petitioner Pro Se